Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-212-93 ANUAR CJ (MALAYA), WAN ADNAN FCJ AND GOPAL SRI RAM JCA 21 SEPTEMBER 1995

Arbitration *— Agreement — Jurisdiction of court — Stay of proceedings — Whether court has discretion to stay action and order parties to go to arbitration — Whether dispute must be bona fide — Limited categories where stay can be refused — Arbitration Act 1952 s 6*

Civil Procedure *— Stay of proceedings — Arbitration clause — Discretion of court — Principles applicable — Arbitration Act 1952 s 6*

This is an appeal against the order of the High Court in refusing an application by the appellant to stay the suit brought by the respondent on the ground that the parties had agreed to arbitrate their differences. By a written contract dated 15 June 1984, the appellant engaged the respondent, a building contractor, to construct several buildings in Petaling Jaya. The appellant refused to make payment on two interim certificates of payment and as a result, the respondent ceased work. Each side contended that the other had repudiated the contract. On 30 July 1990, the respondent issued a writ claiming a sum of about RM730,000 due on the two certificates and applied for summary judgment. Meanwhile, the appellant took out a summons to stay the action, relying on the arbitration clause in the contract. The application was heard by the senior assistant registrar who dismissed the summons. The appellant then appealed to the judge in chambers. The judge found that the claim did not call for arbitration since there was no bona fide dispute between the parties. He held that the appellant's failure to deny that the amount claimed was owed by them amounted to an admission and there was therefore no dispute to refer to arbitration. The appellant has appealed to the Federal Court.

Held, allowing the appeal:

(1) At common law, a prior agreement to refer disputes to arbitration did not bar the parties from instituting proceedings in the ordinary courts. Neither did it preclude the court from entertaining a suit filed in breach of the agreement to arbitrate. However, the court could, in the exercise of its discretion, stay an action and require a plaintiff to adhere to the obligation voluntarily undertaken to go to arbitration. This power is now embodied in s 6 of the Arbitration Act 1952 ('the Act').

(2) Under s 6 of the Act, there is no requirement that the dispute has to be bona fide for the court to exercise its discretion to order a stay. Any dispute or difference would suffice, as the court is not required to critically examine the merits of the claim. A court

may be justified in refusing a stay only in plain and obvious cases, where a reasonable tribunal, without undertaking a meticulous examination of the merits, is bound to hold that the issues raised by a defendant are frivolous or vexatious. A

(3) Where there is an agreement to arbitrate and the conditions set out in s 6 of the Act are satisfied, a court should favour the grant of a stay. The court's residual discretion to refuse a stay is limited to cases involving fraud, or where there is no dispute that falls within the arbitration clause or where the third party procedure will be resorted to. In this case, a proper appreciation of the affidavit evidence was lacking and the judge applied the wrong test and asked himself the wrong question when he held that there was no bona fide dispute between the parties. B C

[Bahasa Malaysia summary

Ini adalah rayuan terhadap perintah Mahkamah Tinggi yang menolak permohonan perayu untuk penggantungan guaman yang dibawa oleh penentang atas alasan bahawa pihak yang berkenaan telah bersetuju untuk menimbangtarakan perselisihan mereka. Melalui suatu kontrak bertulis bertarikh 15 Jun 1984, perayu telah menggaji penentang untuk membina beberapa buah bangunan di Petaling Jaya. Perayu enggan membayar dua perakuan pembayaran interim dan akibatnya, penentang telah memberhentikan kerja. Kedua-dua pihak mengatakan bahawa pihak yang lainnya telah menolak kontrak itu. Pada 30 Julai 1990, penentang telah mengeluarkan writ untuk menuntut jumlah sebanyak RM730,000 yang kena dibayar atas dua perakuan itu dan memohon untuk penghakiman terus. Sementara itu, perayu telah mengeluarkan saman untuk penggantunggan tindakan itu dengan bergantung pada fasal timbangtara di dalam kontrak itu. Permohonan itu telah dibicara oleh penolong kanan pendaftar yang telah menolak saman itu. Perayu telah merayu kepada hakim dalam kamar. Hakim memutuskan bahawa tuntutan itu tidak perlu ditimbangtara kerana tiada pertikaian bona fide di antara pihak berkenaan. Beliau memutuskan bahawa kegagalan perayu untuk menafikan bahawa jumlah yang dituntut itu dihutang olehnya merupakan suatu pengakuan dan dengan demikian, tidak ada pertikaian untuk ditimbangtara. Perayu telah membuat rayuan kepada Mahkamah Persekutuan. D E F G H

Diputuskan, membenarkan rayuan itu:

(1) Mengikut common law, sesuatu perjanjian yang dibuat terlebih dahulu oleh kedua-dua pihak yang berkenaan untuk menyelesaikan pertikaian mereka melalui timbangtara tidak menghalang mana-mana pihak daripada memulakan prosiding di mahkamah biasa. Fasal yang sedemikian juga tidak menghalang mahkamah daripada melayani guaman yang difailkan itu walaupun ia memungkiri perjanjian untuk menimbangtara. Walau bagaimanapun, mahkamah boleh, dalam penggunaan budi I

bicaranya, menggantungkan tindakan dan mengarahkan supaya plaintif menunaikan kewajipannya yang dipikul secara sukarela untuk menimbangtara. Kuasa ini sekarang terkandung di dalam s 6 Akta Timbangtara 1952 ('Akta itu').

(2) Di bawah s 6 Akta itu, tidak terdapat keperluan bahawa pertikaian itu mestilah bona fide untuk mahkamah menggunakan budi bicaranya dalam memerintahkan suatu penggantungan. Sebarang pertikaian atau perselisihan adalah mencukupi kerana mahkamah tidak perlu memeriksa dengan teliti merit tuntutan itu. Sesuatu mahkamah boleh mempunyai justifikasi untuk menolak suatu penggantungan hanya di dalam kes yang mudah dan jelas, di mana sesuatu tribunal yang munasabah, tanpa menjalankan suatu pemeriksaan teliti atas merit tuntutan itu, adalah terikat untuk memutuskan bahawa isu yang dibangkitkan oleh defendan adalah remeh atau menyusahkan.

(3) Di mana terdapat suatu perjanjian untuk menimbangtara dan syarat yang dinyatakan di dalam s 6 Akta itu dipenuhi, mahkamah seharusnya memihak kepada pemberian suatu penggantungan. Baki budi bicara mahkamah untuk menolak suatu penggantungan dihadkan kepada kes yang melibatkan fraud, atau di mana tidak ada pertikaian yang jatuh di bawah fasal timbangtara itu atau di mana prosedur pihak ketiga akan digunakan. Di dalam kes ini, tidak terdapat fahaman yang betul tentang keterangan afidavit dan hakim telah menggunakan ujian yang salah dan menanya dirinya soalan yang salah apabila beliau memutuskan bahawa tidak terdapat pertikaian bona fide di antara pihak-pihak berkenaan.]

Notes

For cases on arbitration, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 697–833.

For cases on stay of proceedings pending arbitration, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3128–3138.

Cases referred to

Dobbs v National Bank of Australasia Ltd (1935) 53 CLR 643 (refd)

Gaya Electric Supply Co Ltd v State of Bihar AIR 1953 SC 182 (folld)

Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong [1995] 1 MLJ 322 (refd)

Malaysia Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors [1972] 1 MLJ 113 (refd)

Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd [1991] 3 MLJ 309 (refd)

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (folld)

Union of India v Birla Cotton Spinning & Weaving Mills Ltd AIR 1967 SC 688 (refd)

Legislation referred to

Arbitration Act 1952 s 6

Appeal from: Civil Suit No 22–199–90 (High Court, Shah Alam)

Zainur Zakaria (*Zainur Zakaria & Co*) for the appellant.
Premalatha Kanason (*Vincent Lim & Teoh*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): This appeal is directed against the order of the High Court at Shah Alam refusing an application by the appellant to stay the suit brought by the respondent on the sole ground that the parties had agreed to arbitrate their differences. The matter arose in this way.

The respondent is a building contractor. By a contract in writing dated 15 June 1984, the appellant engaged the respondent to construct a four-storey office building, a factory and a warehouse on a site in Petaling Jaya. The value of the contract was in the region of approximately RM7.4m. The contract housed an arbitration clause which may quite safely be described as a legal grammarian's nightmare. It is cl 43 of the contract and reads as follows:

> Provided always that in case any dispute or difference except a dispute or difference as to rates of wages or conditions of employment of workmen employed by the contractor in and for the performance of this contract including workmen employed by nominated sub-contractors and by authorized sub-contractors engaged directly by the contractor shall arise between the employer or the superintending officer on its behalf and the contractor, either during the progress or after completion of the works or after the determination, abandonment, or breach of the contract as to the construction of the contract or as to any matter or thing arising thereunder, or as to the withholding by the superintending officer of any certificate to which the contractor may claim to be entitled, then the superintending officer shall determine such dispute or difference by a written decision given to the contractor. The said decision shall be final and binding on the parties unless the contractor within 14 days of the receipt thereof by written notice to the superintending officer disputes the same, in which case or in case the superintending officer for 14 days after a written request to him by the contractor fails to give a decision as aforesaid, such dispute or difference shall be referred to the arbitration and final decision of a person nominated and appointed by agreement between the superintending officer and the contractor or in event of his death or unwillingness or inability to act, or if the superintending officer and contractor fail to agree, of an arbitrator nominated by the chief execution officer of the employer providing the funds for this contract and the award of such arbitrator shall be final and binding on the parties. Such reference, except on the question of certificates, shall not be commenced until after the completion or alleged completion of the works, unless with the written consent of the superintending officer and the contractor. The arbitrator shall have power to review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him, and of which notice

A shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given. Upon every or any such reference the costs of and incidental to the reference and award shall be in the discretion of the arbitrator, who may determine the amount thereof, or direct the same to be taxed as between solicitor and client or as between party and party, and shall direct by whom and to whom B and in what manner the same shall be borne and paid. This submission shall be deemed to be a submission to arbitration within the meaning of the Arbitration Enactment.

Work commenced under the contract and, from time to time, interim certificates of payment were issued by the certifying authority nominated C under the contract. The appellant honoured some of these certificates. Later, it refused to make payment on two certificates. The respondent then ceased work.

Each side contended that the other had repudiated the contract. The appellant claimed that it was entitled to liquidated and ascertained damages D from the respondent because, inter alia, he wrongly stopped work. The respondent says that it was not paid its dues and was therefore justified in stopping work. He says that the refusal by the appellant to pay on the certificates amounts to a breach that went to the root of the contract, entitling him to withdraw his workforce and machinery. On 30 July 1990, the respondent issued a writ claiming a sum of about RM730,000 due on E the two certificates in question. He moved for summary judgment. In the meantime, the appellant took out a summons to stay the action. It relied on the arbitration clause to which we have referred. The application went before the senior assistant registrar who, after hearing argument, dismissed the summons. The appellant then appealed to the judge in chambers. F Although termed an appeal, it is in reality a rehearing of the summons. The judge deals with the matter as if it were coming before him for the first time: he is unfettered by the decision of the registrar. See *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at pp 105–107.

G In this case, the judge did precisely that. He came to the conclusion that there was no bona fide dispute between the parties and that therefore the arbitration clause did not operate. This is what he said in his written judgment:

> The only question to be considered is whether the claim by the plaintiff H against the defendants falls within the meaning of cl 43 of the agreement.
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> *I am of the view that only bona fide disputes call for settlement by arbitration and I was satisfied that the defendant had not made out a case to show that a bona fide dispute existed.* I am fortified in my finding by the decision of the Supreme Court in *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 wherein Hashim Yeop A Sani CJ (as he I then was) said at p 314G:
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> > 'To summarize, once the party asking for the stay has satisfied the court that there is a dispute, difference or question between the parties within the meaning of the arbitration clause, then it is a question of exercising the discretion to grant or not to grant the stay.'

I further held that the defendants had not shown that they had denied all the sums were not owing by them. In none of the affidavits filed on behalf of the defendants, had they spelled out the dispute or denied the amount owing to the plaintiff. I am of the view when an amount claimed is not denied it does not call for reference to arbitration on the true construction of cl 43. *Dispute means not just differences arising out of a party's refusal to do something but controversy over contestable matters.* Mere refusal to pay is not a dispute. See the cases of *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177 and *KSM Insurance Bhd v Ong Ah Ba & Anor* [1986] 1 MLJ 237, both decisions by VC George J.

Cik K Prema, counsel for the plaintiff, cited the letter of the defendants to the plaintiff (exh TEC5 in encl 16) and submitted that the defendants have admitted the amount shown owing by the defendants to the plaintiff.

I am of the view that when a claim is admitted it does not call for arbitration. When the amount owing is admitted there is no dispute to be referred to arbitration. This is just a mere refusal to pay. (Emphasis added.)

Encik Zainur Zakaria who appeared for the appellant before us criticized the conclusions of the learned judge on the principal ground that there had been insufficient judicial appreciation of the affidavit evidence delivered by the parties. Counsel submitted that when a careful analysis of the printed evidence is undertaken, it discloses, in the words of cl 43, a 'dispute or difference' between the parties to the contract on at least three matters. These are as follows:

(1) whether the appellant was justified in deducting liquidated and ascertained damages under the contract from the sums claimed by the respondent;

(2) whether the abandonment of works by the respondent amounted to a breach of contract; and

(3) whether the variation orders had been properly issued.

Counsel further submitted that these issues plainly fell within the scope of the widely drafted arbitration clause in this case so that discretion ought, in the ordinary way, to have been exercised in favour of staying the action with a view of allowing the parties to proceed to arbitration.

While recognizing the strength of counsel's arguments in the factual context of this particular case, we are of opinion that those passages in the judgment of the learned judge upon which we have placed emphasis raise wider issues, both of policy and principle, concerning the power of the court to stay proceedings on the ground that the parties to a litigation had previously agreed to arbitrate. These are important matters. In order to fully appreciate them it is necessary to examine and review the relevant principles governing a case such as the present and to decide whether the current policy upon the subject under discussion should be modified, and if so, to what extent.

At common law, a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the ordinary courts. Neither did such a clause preclude the court from entertaining a suit filed in breach of the contract to arbitrate. However, the court could, in the exercise of its

discretion, stay an action and require a plaintiff to adhere to the obligation voluntarily undertaken to go to arbitration. The judicial philosophy behind this approach is based upon sound principle. It is this. Since consent cannot confer jurisdiction upon a court which has none, there can be no consensual ousting of a court's jurisdiction to hear and determine disputes between litigants. See, *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 322.

In *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643, at p 652, the High Court of Australia explained the common law position in words that merit recollection:

> What no contract can do is to take from a party to whom a right actually accrues, whether *ex contractu* or otherwise, his power of invoking the jurisdiction of the courts to enforce it. (*Kill v Hollister* (1746) 1 Wils 129); *Thompson v Charnock* (101 ER 1310); *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478). Accordingly, a contract providing for arbitration did not, apart from statute, prevent the institution of an action or suit, even although an actionable breach of contract was committed by the refusal to refer. (*In re Smith & Service and Nelson & Sons* (1890) 25 QBD 545 at p 547, per Bowen LJ). But if, before the institution of an action, an award was made, it governed the rights of the parties and precluded them from asserting in the courts the claims which the award determined. By submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them. That authority enables him to extinguish an original cause of action.

Legislative intervention in this area of commercial law was inevitable. Indeed, it has helped place the law upon the subject on a proper footing. It took the form of what is now s 6 of the Arbitration Act 1952 ('the Act'). That section reads as follows:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

There are several prerequisites that need to be met before a court may begin the exercise of discretion conferred upon it by the section. We are here concerned with only one of them. It is the requirement that there must be a dispute or a difference falling within an arbitration clause in any given case. Absent a dispute or difference contemplated by the particular clause, no question of a stay can arise. But, as may be seen from a reading of the section, this is not a statutory postulate.

In *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309, Hashim Yeop A Sani CJ (Malaya) explained the nature of the requirement now under consideration in language the clarity

of which is usually associated with that very learned judge. This is what he said at p 314: A

> In our view the absence of a developed or fully blown dispute or difference at the date of the issue of the writ, is not a ground for refusing stay, if the court finds there is a dispute or difference, for to hold otherwise would encourage a claimant who was subject to an arbitration agreement but who did not wish to go to arbitration, to rush to court at an early stage in order to defeat the arbitration agreement. B
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> Once it is established that there has arisen a dispute or difference or question, the language of s 6 of the Act places on the plaintiff the burden to show that it ought not to be referred to arbitration. As correctly stated by the learned judge, the fact that there is apparent weakness in the respondent's case should not be taken as an excuse to brush aside an arbitration clause to which the appellant was a party and which was being insisted on by the respondent. C

The law reports are replete with cases in which courts have refused a stay on the ground that no dispute or difference as contemplated by the particular arbitration clause in those cases has arisen. Some of these appear in the judgment of the learned judge. The rationale of those cases may be summed up in the words of Shah J, in *Union of India v Birla Cotton Spinning & Weaving Mills Ltd* AIR 1967 SC 688, no doubt spoken in another factual context: D

> But the Union is not seeking to go to arbitration on a dispute between the parties about a breach committed by one side or the other or whether circumstances have arisen which have discharged one or both parties from further performance. *It is a case in which in substance there is no dispute between the parties 'under', 'in connection with', or even 'with regard to' the contract.* The plea raised by the Union for stay of the suit was frivolous. (Emphasis added.) E F

From a reading of the authorities we are unable to discern any requirement that the dispute or difference should be bona fide — the adjective used by the learned judge to describe the nature of a dispute entitling a defendant in a suit to move a court under s 6 of the Act. It is therefore necessary for us to decide whether this added requirement should be imposed upon a party who seeks to stay an action under s 6 of the Act. G

We apprehend that there are two courses open to us in this matter. The first is to interpret the words 'sufficient reason' appearing in s 6 of the Act as imposing a very light burden on a plaintiff to show that the action should proceed. This may be achieved by placing little weight on the agreement to arbitrate and by recognizing an untrammelled discretion in the court hearing an application for a stay. One may, for instance, be prepared to uphold the exercise of discretion by a judge that there is no bona fide dispute. This course is, however, fraught with danger. There is the danger that it may entitle a party to a contract to disregard an obligation he had willingly undertaken. H I

Further, the added condition that a dispute must be bona fide in order for a stay to be granted would take the court into an exercise that *ex necessitae rei* involves a critical examination of the merits of the claim.

A Such an exercise is not contemplated by the Act and is certainly outside the parameters of the court's function under s 6.

In *Gaya Electric Supply Co Ltd v State of Bihar* AIR 1953 SC 182 at p 185, Mahajan J explained the role of a court faced with an application for a stay of proceedings under the Indian equivalent of s 6 of the Act in a B passage that merits reproduction:

> Now this is the very point which would be in issue in the suit itself, and the learned judge was in error in considering and deciding this point in this enquiry under s 34. *The validity of the plaintiffs' contention in the suit cannot be gone into by that court exercising jurisdiction under this section as its function* C *is a very limited one.* The only point in such cases to be decided is whether the claim which is brought — whether it is good, bad or indifferent — comes within the submission to arbitration. It may be that there are grounds upon which the defendant would be able to satisfy the proper tribunal that the plaintiff's claim was frivolous and vexatious, but those considerations, as pointed out by Bankes LJ in *Monro v Bognor Urban Council* [1915] 3 KB D 167, are material only if the question to be considered is whether the case made was a frivolous and vexatious one, and ought to have had no weight at all upon the question of what the plaintiff's claim in fact was and one can only find out what his claim is by looking at the plaint. (Emphasis added.)

We would respectfully adopt these views as our own and merely add that the observations made by Mahajan J apply with equal force to a defendant. E When considering an application under s 6 of the Act, it is no part of the court's function to decide whether the defendant has raised a bona fide dispute warranting a stay. The strength or weakness of the issues raised by a defendant must await the decision of the tribunal especially chosen by the parties to decide the differences that have arisen between them. It is F only in plain and obvious cases, where a reasonable tribunal, without undertaking a meticulous examination of the merits, is bound to hold that the issues raised by a defendant are frivolous or vexatious, that a court may be justified in refusing a stay.

The second course which is open to us is adherence to the settled G approach that now prevails, by limiting the categories of cases in which a stay may be refused. A case falling within this limited category would be one in which fraud is pleaded. (See, *Malaysia Government Officers' Co-operative Housing Society Ltd v United Asia Investment Ltd & Ors* [1972] 1 MLJ 113.) The jurisprudence upon the established approach has been H succinctly stated by Edgar Joseph Jr SCJ (now FCJ) in *Seloga Jaya* [1994] 2 MLJ 97, in the following passage (at p 112):

> It is well known that if a party can satisfy the court that the conditions for the grant of a stay under s 6 of the Act are satisfied, it does not ipso facto follow that he will be entitled, as of right, to a stay, for the court still retains a discretion to refuse it. But, generally, as the judge rightly recognized, the I approach of the court will be that those who make a contract to arbitrate their disputes, should be held to their bargain for, in the oft-quoted words of Martin B in *Wickham v Harding* (1859) 28 LJ Ex 215, 'A bargain is a bargain, and the parties ought to abide by it, unless a clear reason applies for their not doing so'.

It is implicit in the foregoing passage that, given an agreement to arbitrate and the satisfaction of the conditions set out in s 6 of the Act, a court should lean towards the grant of a stay. This, in our judgment, is the correct approach. The residual discretion which the court retains is limited to a very narrow class of cases, such as those involving fraud or where there is, on a proper construction of the arbitration clause, no dispute that falls within its purview or where the third party procedure under the rules of court will most probably be resorted to. In the last of these situations, it is trite that an arbitrator has no jurisdiction to order third party proceedings.

We are aware of the law's reluctance to create or recognize categories or classes of cases in the realm of the exercise of judicial discretion. But in the area of the law with which we are presently concerned, it is a necessary evil to which resort must be had to ensure that development takes place in an orderly fashion.

Returning now to the facts of the present case, we are satisfied that there was abundant evidence before the learned judge disclosing a dispute upon each of the three issues raised by Encik Zainur Zakaria in argument. We agree with counsel that there was lacking in this case a proper appreciation of the affidavit evidence on the aforesaid issues. In our judgment, the learned judge applied the wrong test and asked himself the wrong question when he held that there was no bona fide dispute between the parties. Indeed, we are of opinion that the learned judge went too far and was clearly wrong when he held that there must be a bona fide dispute for the s 6 of the Act to bite. In our view a dispute or difference, whether bona fide or not would suffice.

It is settled law that in an appeal such as this, where all that we are concerned with is the exercise of discretion by a court to whom the primary decision-making power is entrusted, the initial function of this court is one of review only. It has no original discretion of its own to exercise. Only after it has been demonstrated to a conviction that the High Court has committed one or more of those errors which would entitle appellate interference does this court become seized of an original discretion of its own. This is a case which falls within the latter category and is accordingly one in which this court is entitled to exercise an original discretion of its own.

Having considered the facts most carefully, and applying the relevant law to those facts, we are satisfied that discretion should be exercised in favour of the appellant. Accordingly, the appeal was allowed, the order of the learned judge was set aside and the respondent's action was ordered to be stayed. The appellant was also awarded the costs of this appeal.

Appeal allowed.

Reported by Prof Ahmad Ibrahim